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No. 81-1805

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WILLIAM M. GIBBONS, Trustee, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ROCK ISLAND RESPONDENTS IN OPPOSITION

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April 29, 1982

ISSUE PRESENTED

Did the reorganization court abuse its discretion in refusing to impose labor protection conditions in the total line abandonment of the Rock Island Railroad when it based its decision on the consistent decisions of this Court, the lower federal courts and the Interstate Commerce Commission, the recommendations of the Commission and independent experts, and five years of hearings regarding the factual circumstances of this case?

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE ROCK ISLAND RESPONDENTS IN OPPOSITION

The Rock Island respondents[1] respectfully request that this Court deny the petition for a writ of certiorari filed by Petitioner Railway Labor Executives' Association ("RLEA") in the above proceeding.

OPINIONS BELOW AND JURISDICTION

The Rock Island respondents adopt that portion of the petition entitled "Opinions Below" and "Jurisdiction."

[1]The Rock Island respondents are: William M. Gibbons, Trustee of the Chicago, Rock Island & Pacific Railroad Company (the "Rock Island"); Henry Crown, et al., substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island; The First National Bank of Chicago, as indenture trustee for the first mortgage bondholders; and Continental Illinois National Bank and Trust Company of Chicago, as indenture trustee for the income debenture holders. Parent companies, subsidiaries and affiliates of the Rock Island respondents are listed in Appendix A, hereto.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Rock Island respondents adopt that portion of the petition entitled "Constitutional Provisions and Statutes Involved," but add that this case involves the uniform interpretation accorded to Section 10903 of the Interstate Commerce Act, 49 U.S.C. § 10903, and Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, reproduced in pertinent part *infra*, p. 3, n.3.

STATEMENT OF THE CASE

The facts pertinent to these proceedings are set forth in the petition at pages 1-15 and in the opinion of the court of appeals (Pet. App. 1a-3a).[2]

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT BELOW WAS CONSISTENT WITH DECISIONS OF THIS COURT, AND WITH THE UNIFORM DECISIONS OF OTHER COURTS AND THE INTERSTATE COMMERCE COMMISSION.

The determination of the reorganization court and the court of appeals that the Rock Island had no labor protection obligation is consistent with the relevant legislative history, an unbroken line of Interstate Commerce Commission determinations, and this Court's decision in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920), and its progeny.

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[2]The respondents take exception to the statement of petitioner that the Trustee "locked-out" his contract employees. (Pet. 5.) This is not supported by the record below. For a more complete narrative of these reorganization proceedings, the Rock Island respondents respectfully refer the Court to its narrative of these reorganization proceedings in *RLEA* v. *Gibbons* ___ U.S. ___, 102 S.Ct. 1169, 1171-74 (1982) and the statement of facts at pp. 5-15 of the Brief for the Rock Island Appellees, filed therein on September 26, 1981 (hereinafter "Appellees' Brief").

In 1979, Congress enacted the current procedure for abandonments of railroads in reorganization under Section 77 of the Bankruptcy Act of 1938, as amended. Section 17(a) of the Milwaukee Railroad Restructuring Act, 45 U.S.C. § 915(a), transferred the jurisdiction to authorize abandonments of rail lines from the Commission to the reorganization court. It also transferred to the reorganization court jurisdiction to consider labor protection issues which arise in connection with abandonments. Congress specifically directed the reorganization court to follow the law of labor protection that had evolved under the Commission's decisions, so that this transfer of jurisdiction from the Commission to the reorganization court would make "no change in existing law as it affects employee protection." H.R. CONF. REP. NO. 96-583, 96th Cong., 1st Sess. 27, *reprinted in* 1979 U.S. CODE. CONG. & AD. NEWS 1747, 1759.[3]

Prior to the enactment of Section 17(a), Commission approval of abandonments of railroad lines was governed by 49 U.S.C. § 10903. Like Section 17(a), Section 10903 incorporated and followed the Commission's decisions on labor protection that were

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[3]Section 17(a) provides:

> "[I]n authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under Section 11347 of Title 49 [of the United States Code]."

45 U.S.C. § 915(a).

Section 11347 is the recodification of Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f), which applies only to labor protection to be accorded in consolidation, mergers and acquisitions.

Section 11347 provides that the I.C.C. shall require a carrier

> "to provide a fair arrangement at least as protective of the interests of employees who are affected by [consolidation, merger or acquisition] as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45."

49 U.S.C. § 11347.

issued pursuant to Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347. Under Section 10903, when a railroad abandoned only part of its operation, employee protection conditions were imposed. *See Oregon Short Line Railroad—Abandonment—Goshen*, 360 I.C.C. 666, 667 (1980). When entire lines were abandoned, however, the Commission consistently refused to impose labor protection conditions. As the Commission pointed out in this case in its advisory report of May 23, 1980 to the reorganization court, "[i]n past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the imposition of employee protective conditions not to be warranted." *Chicago, Rock Island & Pacific Railroad—Abandonment*, 363 I.C.C. 150, 161 (1980). *Accord, Montpelier & Barre Railroad—Abandonment*, Dkt. No. AB-202F (I.C.C. Feb. 6, 1980); *Northampton & Bath Railroad—Abandonment*, 354 I.C.C. 784, 785-86 (1978); *Wellsville, Addison & Galeton Railroad—Abandonment*, 354 I.C.C. 744, 746 (1978); *Tennessee Central Railway—Abandonment*, 333 I.C.C. 443, 453-54 (1968); *East Carolina Railway—Abandonment*, 324 I.C.C. 506 (1964); *Okmulgee Northern Railway—Abandonment*, 320 I.C.C. 637, 645-46 (1964); *Rutland Railway—Abandonment*, 317 I.C.C. 393, 408 (1962), *aff'd sub nom. Brotherhood of Locomotive Engineers v. United States*, 217 F. Supp. 98 (N.D. Ohio 1963). *See also In re New York, Susquehanna & Western Railroad*, 504 F. Supp. 851, 854-56 (D. N.J. 1980), *aff'd*, Nos. 81-1121 and 81-1929 (3d Cir. Nov. 16, 1981), *petition for cert. filed*, 50 U.S.L.W. 3784 (U.S. Mar. 16, 1982) (No. 81-1715).[4]

For example in *Wellsville, Addison & Galeton Railroad—Abandonment, supra*, 354 I.C.C. at 746, the Commission stated:

> Prior Commission precedent in this area is well established. Employee protective conditions have not been im-

[4]For a full discussion see Appellees' Brief at 28-44.

> posed in cases involving complete abandonment of operations, because the Commission found it unwarranted to require further consumption of a railroad's properties for the payment of employees after the railroad ceases operations. *Okmulgee Northern Ry. Co.—Abandonment*, 320 I.C.C. 637 (1964). *Tennessee Central Ry. Co.—Abandonment*, 333 I.C.C. 443, 454 (1968).

Petitioner presents no law to the contrary. Rather, petitioner contends that these decisions are "erroneously decided" and inapposite. (Pet. 23.) However, Congress specifically recognized, when it re-enacted Section 10903, that system-wide abandonments are subject to this discrete and consistent rule. The legislative history of Section 10903 makes the point plainly, referring to

> [e]mployee protection no less beneficial than that established under Section 5(2)(f) of the Interstate Commerce Act and Section 405 of the Rail Passenger Service Act but *without intention to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company*. . . .

S. CONF. REP. NO. 94-595, 94th Cong., 2d Sess. 218, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 148, 233 (emphasis supplied).[1]

The Commission's consistent refusal to impose labor protection in total line abandonments—in the context of a railroad entitled to liquidate—is consistent with and compelled by the uniformly recognized right of investors to withdraw their property from public transportation service under the circumstances described in the *Brooks-Scanlon* line of cases. See Appellees' Brief at 25-27. As this Court recognized in *Brooks-Scanlon*, "If the plaintiff

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[1] This legislative history related to Section 1a(4), which has been recodified as Section 10903. Thus, petitioner's contention that pre-1976 cases are irrelevant (Pet. 23) is erroneous. Similarly, there is no authority for petitioner's purported distinction between "major carriers" and others. (Pet. 23.)

be taken to have granted the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss." 251 U.S. 399. *Accord, Railroad Commission* v. *Eastern Texas Railroad,* 264 U.S. 79, 85 (1924); *Bullock* v. *Railroad Commission,* 254 U.S. 513, 520-21 (1921). Thus it is a "basic principle that an owner of property retains the right ultimately to withdraw that property from a losing venture. Indeed, such a right appears to be a fundament of the taking provision." *In re Central Railroad,* 485 F.2d 208, 213 (3d Cir. 1973), *cert. denied,* 414 U.S. 1131 (1974) (footnotes omitted). *See also Regional Rail Reorganization Act Cases,* 419 U.S. 102, 122-24 (1974).

The petitioner argues for a *per se* rule—labor protection conditions *must* be imposed in all abandonments. (Pet. App. 9a.) This contention is unfounded. Even assuming, *arguendo,* that the imposition of labor protection is not prohibited in all total abandonments, at a minimum the reorganization court retains discretion not to impose it. The Commission recognized this in rejecting labor protection conditions in *Northampton & Bath Railroad—Abandonment, supra,* 354 I.C.C. at 785-86:

> Congress did not intend to curtail the Commission's discretion regarding protective conditions in entire line abandonments.
>
> After the entire line of a railroad is abandoned, no operating carrier remains to . . . pay the costs of employee protection . . . [E]mployee protective conditions . . . would, in effect, require continued operation for the benefit of employees or further consumption of a failed railroad's properties for payment of employees' benefits after operations cease.

There can be no challenge to the reorganization court's exercise of discretion in the circumstances of this case. The Rock Island's right to withdraw completely from rail service is compelling. After a decade of losses totaling $103.4 million, the railroad entered reorganization in 1975. At the Court's direction, rail operations were continued for four and one-half years at a staggering

loss of $210,627,230. By the summer of 1979, the Rock Island was rendered cashless as a result of continued losses, the strike by certain unions represented herein by the RLEA, and the failure of those unions to order their members to comply with the Presidential Order to return to work. The Commission, the Federal Railroad Administration, the Department of Transportation, the reorganization court and the United States Court of Appeals all thereafter agreed that the Rock Island could not be reorganized on an income basis as an ongoing railroad. (Pet. App. 2a-6a.)

The *Oregon Short Line* labor protection conditions, which petitioner seeks, would require payment to each employee of a dismissal allowance, effectively equivalent to his annual wage for six years. 360 I.C.C. at 98-103. Based on the payroll at the time Rock Island's operations ceased in the fall of 1979, the cost of labor protection could exceed $500 million.[6] Petitioner does not suggest how this sum of money will materialize.[7]

It is for these reasons that the Commission and courts have uniformly refused to impose labor protection conditions on total line abandonments. Petitioner cannot separate this well-established rule from its jurisprudential roots in constitutional values, legislative history and common sense. Petitioner provides no basis in the circumstances of this case for a radical departure from that rule.

Accordingly, the reorganization court and the court of appeals were correct in refusing to condition the Rock Island's abandonment upon the imposition of labor protection conditions.

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[6] *See In re Chicago, M., St. P. & P. R.R.*, 658 F.2d 1149, 1156 (7th Cir. 1981), *petition for cert. denied sub nom. RLEA* v. *Ogilvie*, 50 U.S.L.W. 3716 (U.S. Mar. 8, 1982) (No. 81-1250) where the cost of labor protection under this same formula is estimated as between $300 million and $1.2 billion.

[7] The Commission concluded under similar circumstances in *Tennessee C. Ry., supra*, that it is "neither equitable nor warranted on any ground . . . to require further consumption of the railroad properties for the payment of employees after the railroad ceases operations." 333 I.C.C. at 454.

II. THIS CASE DOES NOT MERIT REVIEW BY THIS COURT BECAUSE THIS CASE HAS ONLY LIMITED PRECEDENTIAL VALUE, PRESENTS NO CONSTITUTIONAL ISSUE, AND CONCERNS ONLY A NARROW ISSUE OF STATUTORY CONSTRUCTION.

This case presents no constitutional question. Rather it presents only a narrow issue of statutory construction about which there is no conflict among the lower courts. The court of appeals applied a uniformly recognized statutory principle against the background of the special circumstances of these reorganization proceedings: the five years of futile and costly efforts to save the Rock Island as an operating railroad; the Interstate Commerce Commission's finding that the Rock Island was cashless; the reorganization court's finding, based upon the testimony of its own expert witness, that the Rock Island could not be reorganized as an operating railroad on an income basis; the Commission's report recommending total abandonment; and the reorganization court's liquidation order. (Pet. App. 4a.)[7] The petitioner's arguments concerning the impact of this case not only ignore the fact that the courts below applied the same uniform interpretation of the relevant law that has been applied in all other similar cases but also ignore the power of Congress to enact new legislation if it disagrees with the uniform interpretation given its enactments by the courts. The petitioner argues that in light of the decision of the district court below and the *Susquehanna* decisions, Congress "cannot be assured" that any new enactments will

[7]This particularized focus explains the Seventh Circuit's decision to publish its opinion in this case under its own Circuit Rule 35, thus precluding reliance on this case as precedent for any other case within the circuit. Circuit Rule 35(b)(2)(iv) provides:

> Except to support a claim of *res judicata*, collateral estoppel or law of the case, [unpublished orders] shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose.

be upheld by the courts. (Pet. 20-21.) It argues that "under the guise of either statutory construction or the protection of general, undefined constitutional rights," the lower courts have imposed "unwarranted obstacles" on the ability of Congress to legislate. (Pet. 16.) However, the decision of the court of appeals *sub judice* rested solely on statutory grounds, and petitioner is not entitled to an advisory opinion on the constitutional parameters of permissible legislation to guide Congress in the unlikely event it enacts new legislation.

The court of appeals properly interpreted the relevant statute so as to avoid the complicated constitutional challenge that petitioner's interpretation would raise. *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). For the same reasons, this Court should not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Ashwander* v. *Tennessee Valley Authority*, *supra*, 297 U.S. at 346, *quoting Liverpool, New York and Philadelphia Steamship Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

III. THE COURT OF APPEALS DID NOT MISCONSTRUE 11 U.S.C. § 1170 TO PERMIT AN ABANDONMENT WITHOUT AN EVIDENTIARY HEARING.

Petitioner contends that the court of appeals erred in affirming the reorganization court's abandonment order because the reorganization court did not hold an evidentiary hearing. (Pet. 25-29.) The court of appeals determined, however, that the reorganization court provided an adequate evidentiary hearing. (Pet. App. 4a-5a.)

Judge McGarr stated this point (Pet. App. 27a):

> I've been holding hearings on the subject of abandonment of the Rock Island for five years. Five years of arguments,

> reports, surveys, audits, plans, Commerce Commission recommendations. . . . I have determined, based on all of these hearings, that there's nothing left which can be reorganized. . . .

Additionally, as the court of appeals noted, petitioner sought an evidentiary hearing essentially to attack collaterally the reorganization court's January 25, 1980 liquidation decision, "a question that had been previously decided." (Pet. App. 5a.) In short, the issue *sub judice* has been considered by the Interstate Commerce Commission, the Federal Railroad Administration, the Department of Transportation, independent experts, the reorganization court, and the court of appeals. All have unanimously agreed upon the challenged result. Any additional expenditure of judicial resources would not be well spent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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